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ALEXANDER L. STEVAS,
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

DAVID BATTISTI,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

NICHOLAS J. NASTASI
241 South 7th Street
Philadelphia, PA 19106
(215) 625-2991
Counsel for Petitioner

OF COUNSEL:
Joseph Mellace
142 Bread Street
Philadelphia, PA 19106
(215) 627-0766

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTION PRESENTED

I. Is evidence lacking to establish a violation of 18 U.S.C. §§1084, 1952 and 1955, where the indictment charges a "sports bookmaking" operation as a factual predicate, when the proofs establish only that the accused acted as a bettor?

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NO. _____

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OCTOBER TERM, 1983

DAVID BATTISTI,
Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Petitioner seeks a writ of certiorari to review the judgment of this case by the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

In the United States District Court, although no opinion was filed, a Motion for Judgment of Acquittal was denied, and the Court imposed the judgment of sentence (App. A1) from which a direct appeal was taken to the Court of Appeals.

The judgment order of the Court of Appeals (App. 3) was issued on July 26, 1983 and is as yet unreported. The Court denied a request for rehearing by an Order dated August 18, 1983 (App. A5) which is yet unreported.

JURISDICTION

A judgment of sentence was imposed by the United States District Court from which direct appeal was taken to the Court of Appeals (App. A1).

The judgment of the Court of Appeals was entered, without opinion, on July 26, 1983 (App. A3). Petition for rehearing was denied on August 18, 1983 (App. A5). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1084, "Transmission of Wagering Information" provides in pertinent part:

> (a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

18 U.S.C. §1952, "Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises" provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1),(2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section, "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

18 U.S.C. §1955, "Prohibition of Illegal Gambling Businesses" provides in pertinent part:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section —

(1) "illegal gambling business" means a gambling business which —

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

STATEMENT

The record of this case shows that the failure of the district court to instruct properly the jury created a new Federal crime which previously did not exist. By allowing petitioner's conviction to stand, the Court of Appeals has modified Federal criminal law to permit a mere bettor to be convicted of various Federal statutes which previously proscribed only the activity of a bookmaker.[1/]

While the docket of this Court may be burdened with cases of greater national interest than this one, the unprecedented judgments of the courts below, if not reviewed by this

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1/ Petitioner was indicted with a codefendant by a Federal grand jury for Conspiracy, 18 U.S.C. §371; Transmission of Wagering Information, 18 U.S.C. §1084; and Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises, 18 U.S.C. §1952. After a jury trial, petitioner was convicted of all counts.

Court, would result in a serious injustice to petitioner who is shown by the record to be merely a self-admitted bettor.

Petitioner, David Battisti, is a professional gambler. According to undisputed testimony at trial, for nearly thirty years he has supported his wife, his son, and two handicapped daughters by what perhaps should be seen as the "second" oldest "profession" known to humankind. Defending against allegations in the indictment, petitioner candidly described his activities as a bettor, but denied he was ever a bookmaker.

The origin of this prosecution derives from petitioner's livelihood depending on his ability to win bets. Petitioner, along with Thomas DiNola, an account executive for Xerox Corporation, devised an apparently successful computerized system for placing wagers in various sporting events. This system depended

upon the compilation and evaluation of various factors, for example, the type of playing surface and previous records of the teams, on down to such details as the travel time required for players to arrive at the location of an athletic contest. Further, to enhance their chances of winning, DiNola and petitioner pooled their bets creating large sums in order to obtain the most favorable odds in wagers placed against individual bookmakers. DiNola and petitioner both testified at trial that neither were bookmakers.[2/]

The indictment charged petitioner with

2/ DiNola was a government witness. The government's expert witness, FBI Agent William Holmes, testified that bookmakers are in the business of receiving bets and paying off bets that are won. A bookmaker takes bets from both sides of a contest, thus insuring that he will obtain a profit from the "vig" charged which is a percentage the losing bettor must pay in addition to his bet. A bettor is a customer, not a bookmaker. See, United States v. Box, 530 F.2d 1258 (5th Cir. 1976)

participating in a "sports bookmaking" business or operation and, as the trial court at first recognized, the prosecution concerned only bookmaking.

At trial the contention that petitioner was involved in a bookmaking operation was supported only by argument of the prosecutor predicated on a conclusion of the expert which is unsupported by the evidence. While it became apparent that the government could not prove petitioner was a bookmaker, as set forth in the indictment, the trial court permitted it to amend and expand the theory of the prosecution allowing a conclusion that petitioner had violated the charges by mere betting activity.

While the indictment charged participation in a "sports bookmaking" operation, and one government witness, Agent Holmes, gave his conclusion that the defendant was involved in

bookmaking, the chief government witness, DiNola, testified that neither he nor the defendant were bookmakers. Thus, while there is no dispute that petitioner is a gambler, that he placed bets for himself and others, and that he shared information in order to obtain the most favorable odds against bookmakers, there is no evidence, except for the unfounded conclusion of Holmes, that petitioner was a bookmaker.

The government's amended theory of prosecution as allowed by the charge of the district court permitted the jury to find petitioner guilty even if it found merely that he was a bettor and not a bookmaker.

REASON FOR GRANTING THE PETITION

The grand jury charged petitioner with violations of 18 U.S.C. §1084, Transmission of Wagering Information and §1952, Interstate and Foreign Travel and Transportation in Aid of Racketeering Enterprises.

As a factual predicate to these violations, the grand jury specifically charged petitioner with participation in a "sports bookmaking" operation or business. This original theory of prosecution, as memorialized in the indictment and as exhibited throughout most of the government's case, was that petitioner was one of a number of coconspirators who served as office personnel of a bookmaking establishment. Because the indictment was predicated factually on the existence of a "sports bookmaking" operation or business, the government was bound to establish, as a factual prerequisite, that

petitioner was a bookmaker or that he was involved in a "sports bookmaking" operation. Petitioner maintained the defense that there was no evidence of bookmaking; he acted merely as a bettor.

Gambling, per se, is not illegal under Federal law. Neither 18 U.S.C. §1952 nor 18 U.S.C. §1955 prohibits the activity of a bettor. See, e.g., Sanabria v. United States, 437 U.S. 54 (1978) (Any degree of participation in an illegal gambling business is proscribed except for participation as a mere bettor). Thus, petitioner's admitted activity as a bettor does not subject him to criminal liability under §§ 1952 or 1955. Similarly, betting activity alone has not been held to be a violation of §1084 by the Courts of Appeals which have reviewed the question. For example, a review of gambling prosecutions under §1084 reveals that convictions have been affirmed only when the prose-

cution involved a bookmaker or a bookmaking operation. See, United States v. Sagansky, 358 F.2d 195 (1st Cir. 1966); United States v. Grezo, 566 F.2d 854 (2d Cir. 1977); United States v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979); United States v. Florea, 541 F.2d 568 (6th Cir. 1976); United States v. Stonehouse, 452 F.2d 455 (7th Cir. 1971); United States v. Scavo, 593 F.2d 837 (8th Cir. 1979); United States v. Pezzino, 535 F.2d 483 (9th Cir. 1976).

Over and above the case law, it should be noted that the theory of prosecution admitted by the indictment was more narrow than what the statutes may be argued to proscribe. The grand jury charged and the government sought to prove that petitioner was part of a bookmaking operation, not simply a bettor. The grand jury, through the indictment, thus gave notice of the acts which it charged the statutes proscribed. See, Fed.R.Crim.Pro. 7(c)(1).

The distinction between a bettor and bookmaking was thus essential to provide to the jury. Yet, the jury was unable to determine whether the government had met its burden ofproof because it was not instructed properly by the court. While petitioner specifically requested the court to provide instruction to the jury defining "bookmakers" and "bookmaking" to enable it to distinguish such activity from that of "bettors" and "betting", the court refused the requested points for charge even though the points requested are well established in the law. See, United States v. Tomeo, 459 F.2d 445 (10th Cir. 1972).

Further, the need for these specific instructions was shown by the jury's own request for additional instructions during deliberation on the definition of what constitutes and distinguishes a bookmaker from a bettor. The refusal of the court to instruct the jury as

requested deprived the jury of the only definition possible to evaluate whether the evidence was totally lacking to prove what the indictment required.

A bookmaking business requires a means of assuring a "profit" which is derived from a percentage added to lost bets. The original and repeated instructions of the court totally lacked any mention that this essential element must be shown to satisfy the requirement of the indictment which charged participation as a bookmaker in a business.[3/]

The refusal of the court to instruct the

3/ In United States v. Box, 530 F.2d 1258 (5th Cir. 1976), Circuit Judge Goldberg presents a most exhaustive judicial review of the topic of bookmaking and betting under Federal criminal law. He concludes that a bettor, even a bettor of large sums, does not violate Federal law. The decision discloses indisputably that the Federal anti-gambling statutes were not intended to proscribe the activities of a bettor.

jury that the business of bookmaking requires some system whereby a "profit" is derived, as opposed to mere betting which is predicated on "chance"[4/] alone, aided the government in its amended theory of prosecution. While initially the government contended that it would prove, pursuant to the required factual predicate of the indictment, that petitioner acted as a "bookmaker", after the presentation of its case and the testimony of petitioner, the

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4/ By way of analogy a securities "trader" or "investor", often dealing in large sums, is an occupation which is comparable to that of a bettor. On the other hand, a securities "dealer" or "broker" is an occupation which compares to a bookmaker. The former derives a "profit" only on the "chance" occurrence that the risk taken results in a gain. The latter, on the other hand, derives an assured "profit" by charging a percentage of the sum invested. Similarly, investment clubs, associations of individuals which pool investments, do not constitute securities dealers

government amended its theory to include mere betting activity on the part of the petitioner as a "business activity" proscribed by the statutes. The jury was thus not given a proper legal foundation for exercising its duty to review the evidence in light of the indictment.

The government's amended theory of prosecution and the failure of the court to give the requested instructions permitted the jury to find petitioner guilty even if it found him to be merely a bettor.

4/ Cont'd
or brokers. Such groups are encouraged by the securities industry and are allowed under Federal law recognizing that such clubs, whatever their volumn of trading, are not individuals engaged in the business of "dealing in securities."

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted:

NICHOLAS J. NASTASI
Counsel for Petitioner

OF COUNSEL:

Joseph Mellace

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Crim. 82-00140-2

UNITED STATES OF AMERICA

v.

DAVID BATTISTI

JUDGMENT AND PROBATION/COMMITMENT ORDER

(O)n this date, November 8, 1982 ... (t)here being a verdict of guilty. Defendant has been convicted as charged of the offenses of conspiracy to transmit wager information; aiding and abetting; use of interstate facility (telephone) in aid of racketeering enterprise gambling business in violation of 18 U.S.C. §371; §1084; §2; §1952(a)(3) ... The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and one (1) day plus a fine of Ten Thousand ($10,000) Dollars to be paid within 30 days under Count 1. Under Count 2, the defendant is committed to the custody of the Attorney General ... for a period of one (1) year and one (1) day to run concurrently with the sentence imposed under Count 1. Under Count 3, the imposition of a prison sentence is suspended

and the defendant is placed on probation for a period of five (5) years to run consecutively with the sentences imposed under Counts 1 and 2.

/s/ DANIEL H. HUYETT, 3rd

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1756

UNITED STATES OF AMERICA

v.

DAVID BATTISTI,
a/k/a Davey Crickett

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Crim. No. 82-00140-2)
(Honorable Daniel H. Huyett, 3rd)

Argued July 19, 1983

Before: Adams and Higginbotham, Circuit Judges, and Teitelbaum, District Judge*

*Honorable Hubert I. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After considering all contentions raised by appellant, namely, that (I) evidence is lacking to establish a violation of 18 U.S.C. §§1084, 1952 and 1955, where the indictment charges a "sports bookmaking" operation as a factual predicate, when the evidence establishes only that the accused was a bettor; (II) the charge of the Court failed to provide a definition of "bookmaking" to enable the jury to distinguish a bookmaker from a bettor; (III) fairness is lacking when the Government capriciously refuses to allow the results of a polygraph examination to be admitted and considered at sentencing; and (IV) a prior criminal conviction of the accused was admitted improperly for impeachment where its similarity to certain evidence would cause prejudice, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ ARLIN M. ADAMS
Circuit Judge

ATTEST

/s/ SALLY MRVOS
Sally Mrvos, Clerk

Dated: July 26, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1756

UNITED STATES OF AMERICA

v.

DAVID BATTISTI,
Appellant

(Crim. No. 82-00140-2)

ORDER
SUR PETITION FOR REHEARING EN BANC

Present: Seitz, Chief Judge, Aldisert, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter, Becker, Circuit Judges, and Teitelbaum, District Judge*

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* As to panel rehearing only

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges in the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ ARLIN M. ADAMS
Arlin M. Adams
Circuit Judge

Dated: August 18, 1983